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NO. 480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ARIZONA CORPORATION COMMISSION, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from The United States District Court for the District of Nebraska

PETITION BY APPELLANT STATE REGULATORY COMMISSIONS FOR REHEARING

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Come now appellants, state regulatory commissions, and earnestly Petition for Rehearing of this Court's Order of November 10, 1969, affirming without argument this appeal from the order of the Interstate Commerce Commission prescribing rental rates for railroad freight cars.

In summarily disposing of these appeals as a package, we believe that the Court has allowed the public interest represented by the State appellants to be suffocated by the Government's argument that this case involves only a controversy between the railroads which are parties to other appeals as to whether rental rates are too high or too low (Motion to Affirm, p. 10). The States are not concerned with the interests of the railroads as bailors or bailees of freight cars. The States are concerned solely with the al

ready serious impact on their shippers and their economies of the shortage of freight cars and the uncontroverted fact that the order of the Commission will make that shortage worse.

The concern of the States over freight car shortages is what led to the enactment in 1966 of the amendment to Section 1(14)(a), which provides:

> "In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply. . . ." (49 U.S.C. § 1(14)(a)).

The Commission's order fixes rates for the use of freight cars, but the Commission refused to consider, on the theory that it was irrelevant, the impact of its order on the nation's freight car supply. The States filed their complaint in the court below for the sole purpose of enforcing the statute in order to protect the public interest which the statute was designed to serve.

There is no denying the uncontroverted fact that the car shortage is critical, and that it is getting worse every day. According to a recent statement by the Chairman of the Interstate Commerce Commission, in 1966, the year Section 1(14)(a) was amended, the reported daily average shortages of cars ranged from 3,312 to 13,066, which was serious enough, in the Congress' view, to warrant corrective legislation. The Chairman also stated that in 1969, "reported daily shortages range from 4,626 on January 11 to a high of 18,480 on March 29." (Statement of Virginia Mae Brown, Chairman, Interstate Commerce Commission, on Railroad Freight Car Shortages, Before the Committee on Commerce, United States Senate, May 13, 1969; p. 13.) Since May 13th, when those figures were presented to the Senate, the car supply problem has become even more seri-

ous. On November 1, 1969, the reported daily shortage had jumped to *23,121*. (CS 44-C Reports filed with the Interstate Commerce Commission.) These shortages are crippling the ability of our shippers to obtain badly needed rail transportation for their goods.

Nor is there any doubt that the Commission's order would make the shortage worse by reducing the incentive for the railroad industry to use their cars efficiently or to replace their cars which become unusable or obsolete.*

Therefore, if this Court's order is not modified, and if the Commission's order is permitted to become effective, that order will worsen the car shortage afflicting our states. Furthermore, there will have been no definite construction of the statute, the court below having written three separate and conflicting opinions as to the meaning of Section 1(14)(a).

In requesting argument, these State appellants do not seek any rehearing of the railroads' appeals. The appeal in No. 343 did not raise any question as to the construction of Section 1(14)(a); and the Massachusetts court properly dismissed the compaint of Boston & Maine, et al., raising question as to the sufficiency of the record before the Commission. Nor have the State appellants ever expressed any interest in the questions raised by the railroad appel

* Counsel for the Commission and the United States admit that the "basic" per diem rates prescribed are "perhaps conflicting" with the "purpose of improving car supply." (Motion to Affirm, p. 12.) However, they argue, without any basis in any Commission finding, that any disincentive effect the reduced daily charges will have on car utilization is "speculative" because of the mileage charge which, combined with the daily charge, they say "is likely to create a higher daily payment than at present." (Motion to Affirm, p. 15.) In fact, the mileage charge increases the disincentive of the reduced time charge by making it more expensive for user lines to return empty cars to their owners, and the Commission has never found otherwise.

lants in No. 497 apart from the proper construction of Section 1(14)(a). The States' sole concern is with the proper construction and enforcement of the statutory provisions relating to the adequacy of car supply, not with any contest between car-owning and car-using railroads over the level of freight car rental rates. Such issues, raised by the railroads' appeals, should not be permitted to deny the States their day in Court to argue on behalf of the public interest which Section 1(14)(a) was enacted to protect.

The statutory issue as to which we seek argument is not complex and requires no review of the record. It arises from the Commission's construction of the statute rendering the effect of its order on car supply irrevelant. This issue can be quickly briefed and readily argued on the summary calendar.

WHEREFORE, appellants' Petition for Rehearing should be granted, probable jurisdiction noted and this appeal set for argument on the summary calendar.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58(1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

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